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In The

Supreme Court of the United States

October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,

Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,

Respondents.

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

REASONS FOR GRANTING THE WRIT:

I. THE DECISION BELOW CONFLICTS DIRECTLY WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN *BAKER v. WADE* BY ERRONEOUSLY CONCLUDING THAT *DOE v. COMMONWEALTH'S ATTORNEY* DOES NOT CONSTITUTE BINDING PRECEDENT. 2

II. THE ASSOCIATIONAL ASPECTS OF THE RIGHT OF PRIVACY DO NOT EXTEND TO HOMOSEXUAL ACTS OF SODOMY. 4

CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES:

Baker v. Wade, 769 F.2d 289 (5th Cir. 1985) (en banc) 1, 2, 3

Doe v. Commonwealth's Attorney for the City of Richmond, 425 U.S. 901 (1976), aff'g 403 F. Supp. 1199 (E.D.Va. 1975), reh'g denied, 425 U.S. 985 (1976) 1, 2

Dronenburg v. Zech, 741 F.2d 388, reh'g denied, 746 F.2d 1579 (D.C.Cir. 1984) 1, 2, 3

Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973) 4

Potter v. Murray City, 760 F.2d 1065 (10th Cir. 1985) 1, 4

STATEMENT OF THE CASE

Petitioner hereby adopts and incorporates herein by reference the statement of the case contained in the petition for a writ of certiorari, and will not restate the statement of the case herein.

SUMMARY OF ARGUMENT

Contrary to Respondents' assertion, the recent decision of the Fifth Circuit Court of Appeals in *Baker v. Wade,* 769 F.2d 289 (5th Cir. 1985) (en banc) does present a ripe conflict with the Eleventh Circuit's decision in the case sub judice. The en banc decision in *Baker,* which upheld the constitutionality of Texas' sodomy statute, was founded squarely upon this Court's summary affirmance in *Doe v. Commonwealth's Attorney for the City of Richmond,* 425 U.S. 901 (1976), aff'g 403 F.Supp. 1199 (E.D. Va. 1975, reh'g denied, 425 U.S. 985 (1976). The *Baker* decision held that *Doe's* summary affirmance is binding precedent, and that it should be followed until this Court determines otherwise. This presents a clear conflict with the decision below. *See also Dronenburg v. Zech,* 741 F. 2d 388, reh'g denied 746 F.2d 1579 (D.C.Cir. 1984).

In addition, homosexual sodomy, like polygamy, is not protected by any "associational interest" embodied in a constitutional right of privacy. See *Potter v. Murray City,* 760 F.2d 1065 (10th Cir. 1985).

REASONS FOR GRANTING WRIT

I. THE DECISION BELOW CONFLICTS DIRECTLY WITH THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN BAKER V. WADE BY ERRONEOUSLY CONCLUDING THAT DOE V. COMMONWEALTH'S ATTORNEY DOES NOT CONSTITUTE BINDING PRECEDENT.

In the petition for certiorari, Attorney General Bowers demonstrated that the decision below was contrary to *Dronenburg v. Zech,* 741 F.2d 1388, 1392, reh'g denied, 746 F.2d 1579 (D.C. Cir. 1984). Since the filing of the petition for certiorari, the Fifth Circuit Court of Appeals, in an en banc decision, upheld the constitutionality of Texas' sodomy statute. *Baker v. Wade,* 769 F.2d 289 (5th Cir. 1985) (en banc). The decision in that case was specifically founded upon the continuing efficacy of *Doe v. Commonwealth's Attorney,* 425 U.S. 901 (1976). The *Baker* court stated as follows:

> We consider the decision of the Court in *Doe* to be binding upon us for the reasons stated by the District of Columbia circuit in *Dronenburg v. Zech,* 741 F.2d 1388, 1391-92 (D.C.Cir. 1984), and by Judge Kravitch in her dissent to the Eleventh Circuit opinion in *Hardwick v. Bowers,* 760 F.2d 1202, 1213-16 (11th Cir. 1985). There can be no question but that the decision of the Supreme Court in *Doe* was on the merits of the case, not on the standing of the plaintiffs to bring the suit. We should follow that controlling authority until the Supreme Court itself has issued an unequivocal statement that *Doe* no longer controls.

Id., at 292.

Respondents claim that the issues presented by the *Hardwick* opinion are not yet framed concretely, and that there is no ripe conflict between *Hardwick* and *Baker*. To the contrary, Petitioner shows that the issues are certainly framed with exacting clarity: Is *Doe* binding precedent? Is there a fundamental right of privacy protecting homosexual conduct? If there is such a fundamental right, must Georgia's sodomy statute withstand the strict scrutiny required in the demonstration of a "compelling state interest?"

The decision below found that *Doe* is not binding and that there is a fundamental right to engage in homosexual sodomy. The Eleventh Circuit has mandated that the statute be tested under the compelling state interest criteria. On the other hand, both *Baker* and *Dronenburg* conclude that *Doe* is binding precedent. Both *Baker* and *Dronenburg* conclude that there is no right of privacy to engage in consensual sodomy. Both *Baker* and *Dronenburg* conclude that the standard of review is whether the statute is rationally related to a legtimate state purpose.

In *Baker*, albeit in the context of equal protection, the Fifth Circuit stated:

> In view of the strong objection to homosexual conduct, which has prevailed in western culture for the past seven centuries, we cannot say that '§ 21.06 is 'totally unrelated to the pursuit of' *Id.*, at 809, 89 S.Ct. at 1408, 22 L.Ed.2d at 745, implementing morality, a permissible goal, *Burman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954); *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C.Cir. 1984).

Id., at 292.

It is thus urged that there is a remarkable conflict between the Eleventh Circuit and the Fifth and District

of Columbia Circuits. It is also urged that this conflict is ripe for reconciliation by this Court.

II. THE ASSOCIATIONAL ASPECTS OF THE RIGHT OF PRIVACY DO NOT EXTEND TO HOMOSEXUAL ACTS OF SODOMY.

The opinion below held that while homosexual sodomy is not procreative, "it does involve important associational interests." *Hardwick v. Bowers,* 760 F.2d 1202, 1211 (11th Cir. 1985). The Court then proceeded to equate sodomy with the intimacy of marriage. Respondents urge that the Eleventh Circuit's conclusion that sodomy serves the same purpose, for at least some homosexuals, as marital intimacy, demands the conclusion that sodomy is an activity protected as a fundamental right of privacy, because of its "associational" aspects.

However, Petitioner maintains that if this were the law, then statutes prohibiting polygamy must also fall. The polygamous marriage, it can certainly be argued, serves the same purpose for some as the monogomous marriage. Associational aspects are certainly present. Yet, in *Potter v. Murray City,* 760 F.2d 1065 (10th Cir. 1985), the Court of Appeals for the Tenth Circuit found no authority for extending the right of privacy to polygamous marriages. *Cf. Paris Adult Theater I v. Slaton,* 413 U.S. 49, 68 at n.15 (1973). Likewise, it is asserted that the decision below is unsupported by authority and represents an extension of constitutional protections well beyond what has been recognized by this Court.

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CONCLUSION

For the foregoing reasons, and those set forth in the original petition for a writ of certiorari, it is urged that the writ should be issued to review the judgment and opinion below.

Respectfully submitted,

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